NO. 22043

United States Court of Appeals

FOR THE NINTH CIRCUIT

JEWELL JAMES WILLIAMS,

Appellant,

vs.

FRANK GIBSON, HENRY A. BONEY, ROBERT C. DENT, DE GRAFF AUSTIN and ROBERT C. COZENS as members of the Board of Supervisors of San Diego County (State of California) and JOSEPH C. O'CONNOR, Sheriff of San Diego County (State of California),

Appellees.

On Appeal From the United States District Court
For the Southern District of California

APPELLEES' BRIEF ON APPEAL

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APPELLEES' BRIEF ON APPEAL

A. STATEMENT REGARDING JURISDICTION

Appellees concur that there is jurisdiction on appeal, pursuant to 28 U. S. C. review the action of the trial court. Appellees further concede that the t had limited jurisdiction to determine if the complaint stated a claim with- isdiction of the federal courts. Appellees, however, submit that the trial perly decided the jurisdictional question adversely to appellant and that its should be affirmed.

B. STATEMENT REGARDING PARTIES ON APPEAL

Counsel for appellees assumes that the appeal is taken against the me of the Board of Supervisors and the Sheriff of the County of San Diego in their capacities and not against the County of San Diego as a public entity. It may b counsel for appellees was mistaken in entering an appearance for the County o San Diego in the trial court, as it appears that the County was not named a defe but merely referred to somewhat redundantly in description of the Sheriff in th caption of the complaint [R. 1]. In any event, there is nothing in the notice o appeal [R. 44] or in appellant's opening brief to suggest that an appeal is take against the County of San Diego. On the contrary, appellant apparently conced that the County was not intended as a defendant [Appellant's Opening Brief, p. ll. 14-17]. Accordingly, only the members of the Board of Supervisors and t Sheriff of San Diego County appear on appeal.

C. ARGUMENT

1. THE ISSUE OF FEDERAL QUESTION JURISDICTION WAS NOT PRESENTED TO THE TRIAL COURT AND IS NOT OPEN ON APPEAL

The complaint alleged that jurisdiction was based on "Section 1346 of Title 28 of the United States Code and Chapter 171 of Title 28 of the United Sta Code, known as the Federal Tort Claims Act." Subdivision (b) of the former section gives the federal courts exclusive jurisdiction of tort actions for mone damages "against the United States" and Chapter 171 of Title 28 contains the substantive and procedural statutes concerning such actions. The trial court properly held [R. 40] that these sections of the Code do not confer jurisdiction

ral courts over individual defendants. This is true notwithstanding that they employees or agents of the United States. Benbow v. Wolf, 217 F.2d 203 1954); United States v. Dooley, 231 F.2d 423 (9th Cir. 1955); Radford v. tates, 264 F.2d 709 (9th Cir. 1959); Pacific Freight Lines v. United States, 191 (9th Cir. 1956); Wasserman v. Perugini, 173 F.2d 305 (2d Cir. 1949); v. U. S., 174 F. Supp. 377 (D.C.N.Y. 1959); Spears v. U. S., 266 F. Supp. W. Va. 1967). Appellant concedes this on appeal [Appellant's Opening . 8, ll. 14-16].

In a supplementary memorandum of points and authorities, appellant con- hat jurisdiction was based on diversity of citizenship [R. 30], as the com- sclosed that appellant was confined at the time the complaint was filed at a center for federal prisoners in Springfield, Missouri [R. 2, l. 32]. How- e complaint also alleged that appellant was a "resident and domiciliary of ity of San Diego, State of California" [R. 2], and the trial court properly t appellant could not claim to be a citizen of Missouri, as the requisite intent a home there was lacking [R. 40].

It was also at least suggested by appellant in the trial court that jurisdiction based on California Penal Code, Section 4006, which provides in substance ounty Sheriff, to whose custody a prisoner is committed by process or order nited States, "is answerable for his safe keeping in the Courts of the United according to the laws thereof." An identical provision appeared in the orig- ifornia Code of 1872 as Section 1602 of the Penal Code. See In re Kays, 35 (S. D. Cal. 1888). This was long before the Federal Tort Claims Act and

the waiver of governmental immunity in California, and it is highly unlikely th this provision was ever intended to make the Sheriff subject to civil liability i tort according to the laws of the United States. More likely, it was an acknow ment that the Sheriff was duty bound to confine, produce and release prisoner the orders and process of the federal courts. In any event, the law appears s that state statutes are irrelevant to the question of jurisdiction. They can nei broaden nor limit the jurisdiction of the federal courts. Waterman v. Canal-Louisiana Bank & Trust Co., 30 S.Ct. 10, 215 U. S. 33, 54 L. Ed. 80 (1909) Penn. General Casualty Co. v. Commonwealth of Pennsylvania ex rel Schnade 55 S.Ct. 386, 294 U. S. 189, 79 L. Ed. 850 (1935).

Appellant did not contend in the trial court that "federal question" ju diction existed, nor was the appropriate code section [28 U.S.C. 1331] refer in the complaint or memorandum of points and authorities. Counsel did not a the issue, nor did the court consider it. Under the circumstances, appellees mit that this issue of federal question jurisdiction is not open on appeal. Roto Ltd. v. F. P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962); Andrews v. Olin Mathieson Chemical Corp., 334 F.2d 422 (8th Cir. 1964). Appellees submit this appeal does not present one of those exceptional cases where the rule sho be disregarded under the doctrine of Hormel v. Helvering, 61 S.Ct. 719, 312 552, 85 L. Ed. 1037 (1941).

2. APPELLANT'S ARGUMENT THAT FEDERAL QUESTION JURISDICTION EXISTS IGNORES THE FACT THAT THE TRIAL COURT TOOK JUDICIAL NOTICE OF CERTAIN FACTS

While the record is not perfectly clear, appellees submit that the only
:pretation of the record is that the trial court took judicial notice of the fact
ıppellant was confined in the San Diego County Jail at the time of the injury
the County and its employees were independent contractors of the United
caring for federal prisoners lodged in that facility. In dismissing the
ıt, the trial court referred to [R. 39-40] a previous action filed by appellant
he United States [Civil No. 3241-SD-K, appealed to the Ninth Circuit under
329] where plaintiff sought relief for the same incident. In that verified
ıt, appellant alleged that he was confined in the San Diego County Jail at the
he injury [see the court's order dismissing the earlier action which is part
cord on the present appeal (R. 14-16)]. Moreover, the trial court noted,
esent action, that it held, in dismissing the previous action, that the County
mployees were independent contractors in caring for federal prisoners
to a contract between the United States and the County of San Diego, executed
e authority of 18 U.S.C. 4002 [R. 39-40]. That holding was based on
t taking judicial notice of the relationship between the parties to that con-
. p. 15, l. 31 to p. 16, l. 8].

Appellees submit that the trial court considered the previous verified com-
s the court characterized the present complaint as alleging "in substance
prisoner of the United States he was lodged in the San Diego County Jail"
although the present complaint did not actually specify the place of

confinement. While appellant has not actually attacked the propriety of the tr
court going beyond the "four corners" of the present complaint, appellees sub
that this was proper, at least to resolve an uncertainty. Ramirez v. Fernand
Co. v. Las Palmas Food Co., 146 F. Supp. 594 (D.C. Cal. 1956), aff'd 245
874, cert. den. 78 S.Ct. 384, 355 U.S. 927, 2 L. Ed. 2d 357; Williams v. Mi
Mining & Manufacturing Co., 14 F.R.D. 1 (D.C. Cal. 1953); Emmons v. Sm
58 F.Supp. 869 (D.C. Mich. 1944), aff'd 149 F.2d 869, cert. den. 66 S.Ct. 5
326 U.S. 746, 90 L.Ed. 446; Yudin v. Carroll, 57 F.Supp. 793 (D.C.Ark. 19

Similarly, appellees submit that the trial court took judicial notice o
fact that the County and its employees were independent contractors of the Un
States in caring for federal prisoners lodged in the San Diego County Jail. T
the reason that the trial court considered the applicability of the state statute
limitations and the claim filing requirements of the California Government Co
[R. 41, ll. 2-11, and R. 42-43]. The court took judicial notice that appellee
independent contractors and used the failure to allege compliance with the cla
filing requirements as an alternative ground for its decision, applicable in the
event it was mistaken in finding no jurisdiction based on diversity. Appellees
mit that the court was proper in taking judicial notice of appellees' status as i
pendent contractors. The provisions of similar contracts between the United
Marshal for the Northern District of California and county authorities in that
were judicially noticed in Evans v. Madigan, 154 F.Supp. 913, 916 (f.n. 2) (D
Cal. 1959). The contracts are authorized by 18 U.S.C. 4002, which provides

Federal prisoners in state institutions; employment

For the purpose of providing suitable quarters for the safe-keeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Director of the Bureau of Prisons may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons.

Such Federal prisoners shall be employed only in the manufacture of articles for, the production of supplies for, the construction of public works for, and the maintenance and care of the institutions of, the State or political subdivision in which they are imprisoned.

The rates to be paid for the care and custody of said persons shall take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence and may be such as will permit and encourage the proper authorities to provide reasonably decent, sanitary, and healthful quarters and subsistence for such persons.

nothing in this statute or any other statute which confers on any federal
he right or privilege to direct or supervise the manner in which federal
s confined to state jails are lodged, fed, disciplined, cared for, or controlled,
they are accepted, released and produced at court in conformity with the
nd process of the federal courts.

If appellees are independent contractors, the action against them is pu
a state tort claim and there is no basis for federal jurisdiction in the absence
diversity. Lipka v. United States, 369 F. 2d 288 (2d Cir. 1966), cert. den. 87
Ct. 2061, 387 U.S. 935, 18 L. Ed. 2d 997, rehearing den. 87 S. Ct. 2129, 388 U
925, 18 L. Ed. 2d 1381; Dunn v. United States, 327 F. 2d 59 (6th Cir. 1964); Di
United States, 296 F. 2d 556 (8th Cir. 1961).

3. THE FEDERAL STATUTE RELIED ON BY APPELLANT TO ESTABLISH A DUTY OF CARE IS INAPPLICABLE

Appellant contends that federal question jurisdiction exists because a
are charged with a duty of care by 18 U.S.C. 4042 (quoted at pp. 16-17 of Ap
lant's Opening Brief). However, that statute specifically states that the duty a
to the Bureau of Prisons. There is nothing to suggest that the Bureau of Pris
has any management control or regulatory power over state prisons or jails o
that the same duties apply to sheriffs in charge of state jails lodging federal p
While appellant quotes at length from United States v. Muniz, 374 U.S. 162, 8
Ct. 1850 (1963), there is nothing in that case to suggest that 18 U.S.C. 4042 i
posed a duty on state jailers in dealing with federal prisoners. Appellant's qu
tion from that case is addressed to the problem which the court anticipated in
arising from the federal prisons located in the various states in view of the fac
that the Federal Tort Claims Act makes the question of liability depend largely
the law of the state where the act or omission occurred and yet there is consid
variance as to the immunities and liabilities applicable to prison officials unde
laws of the various states.

4. THE CASE DOES NOT PRESENT A FEDERAL QUESTION REQUIRING TRIAL

Appellant apparently contends on appeal that "federal question" jurisdiction cause the duty of care on which the action is based is established by a tatute and there is a question as to whether or not appellees are federal es. However, as pointed out in the previous section of this brief, the n which appellant relies to establish a duty of care appears on its face to y inapplicable to state jailers holding federal prisoners. Hence, assuming estion of interpretation or construction of the scope of that statute was d by the complaint, and assuming further that such a question was sufficient "federal question" jurisdiction, the question was in effect decided adverse- ellant in the initial stage of determining whether the court had jurisdiction. s concede, as they must, that the trial court had jurisdiction to decide all ertaining to jurisdiction.

The only other federal question supposedly raised by the complaint is the of whether appellees are federal employees or independent contractors. that this is a question of federal law. [Fisher v. United States, 356 F. 2d Cir. 1966); Blackwell v. United States, 321 F. 2d 96 (5th Cir. 1963); United States, 311 F. 2d 604 (10th Cir. 1962), cert. den. 83 S. Ct. 1300, 911, 10 L. Ed. 2d 412], but local rules of respondeat superior apply. o v. United States, 231 F. Supp. 805 (D. C. Nev. 1964); Calloway v. Garber, 171 (9th Cir. 1961), cert. den. 82 S. Ct. 120, 368 U. S. 874, 7 L. Ed. 2d r v. United States, 212 F. Supp. 95 (D. C. N. Y. 1962), aff'd 332 F. 2d 629. in, appellees submit that the question was properly decided by the court in

resolving jurisdiction and there is no further federal controversy to decide.

However, even if the trial court could not properly decide the issue basis of judicial notice, appellees submit that the question as to whether appe are employees or independent contractors is not sufficient to raise federal qu jurisdiction. The rule as stated by Justice Cardozo in Gully v. First Nationa 57 S.Ct. 96, 299 U.S. 109, 81 L.Ed 70 (1936) is:

> To bring a case within the statute, a right or immunity created b the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action . . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.

The federal statute defining "federal employees" [28 U.S.C. 2671] of course no rights or immunities. Moreover, while there may be a question of applyi statute to the facts to determine if appellees are employees or independent co tractors, neither the complaint nor the case as a whole presents a question a validity or construction of that statute. Accordingly, federal question jurisd does not exist. The fact that it may be necessary in the course of litigation t strue or apply provisions of the Constitution or a statute is not sufficient. Pi Jordan, 333 F.2d 951 (9th Cir. 1964), cert. den. 85 S.Ct., 664, 379 U.S. 97 L.Ed. 2d 565, rehearing den. 85 S.Ct. 884, 380 U.S. 927, 13 L.Ed. 2d 814. right, immunity, or claim must be based directly on the federal statute or la question [Johnston v. Byrd, 354 F.2d 982, 984 (5th Cir. 1965)] and there mu

ıtial dispute as to the validity or construction of that law. Shulthis v. Mc-
,32 S. Ct. 704, 706, 225 U.S. 561, 569, 56 L. Ed. 1205 (1912); Oppenheim
ng, 368 F. 2d 516 (10th Cir. 1966), cert. den. 87 S. Ct. 1357, 386 U.S.
L. Ed. 2d 441; Wheeldin v. Wheeler, 83 S. Ct. 1441, 373 U.S. 647, 10 L.
5 (1963); Martin v. Wyzanski, 262 F. Supp. 925, 928 (D.C. Mass. 1967).

5. THE APPLICABILITY OF THE CALIFORNIA CLAIMS PROCEDURE

Appellees, of course, concede that the claims procedure set forth in the
ıa Government Code [Sections 810 through 996.6, particularly Sections
.6 and 950.2] is totally inapplicable if the tortious conduct alleged is purely
city as an employee of the United States. On the other hand, if the acts or
s complained of were in the course and scope of appellees' capacity as
ficials, although acting at the same time as independent contractors of the
overnment, the claims procedure is clearly applicable. Compliance with
ıs procedure is a condition precedent to the accrual of a right of action in
. N.V. Philips' Gloeilampenfabrieken v. Atomic Energy Commission, 316
, 114 U.S. App. D.C. 400 (1963)] and was imposed as an incident of the
sovereign immunity. Compliance is not simply a matter of state court
ıe.

The complaint as framed alleges that appellees were federal employees
. 8-11] as well as County officials [R. p. 1, l. 29 to p. 2, l. 7]. Appellees
ıat if they were acting in a dual capacity, the state claims procedure should
h respect to the liability of individuals. The Federal Tort Claims Act
C. 2671 et seq] and 28 U.S.C. 1346(b) do not purport to waive immunity

or impose liability on individuals [Spears v. U.S., 266 F.Supp. 22 (D.C.W.V
1967); Chafin v. Pratt, 358 F.2d 349 (C.A. Ga. 1966); Gamage v. United Stat
217 F.Supp. 381 (D.C. Cal. 1962)] but only on the part of the United States.
liability of individuals per se was unaffected, and should continue to be based
state substantive law, including conditions imposed on causes of action by the
[Allen v. United States, 338 F.2d 160 (9th Cir. 1964); Kenney v. Trinidad Co
349 F.2d 832 (5th Cir. 1965) cert. den. 86 S.Ct. 652, 382 U.S. 1030]. Acco
ly, even if the court could not take judicial notice of appellees' status as inde
contractors, the decision should be affirmed on the ground that the complaint
alleged that appellees were both County officials and federal employees, faile
state a claim on which relief could be granted.

D. CONCLUSION

For the reasons stated, appellees respectfully submit that the decis
the trial court must be affirmed.

Respectfully submitted,

McINNIS, FOCHT & FITZGERALD

By /s/ LAURENCE L. PILLSBURY

Attorneys for Appellees

CERTIFICATE (Rule 18. 2(g))

certify that, in connection with the preparation of this brief, I have

Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit

in my opinion, the foregoing brief is in full compliance with those rules,

to time.

McINNIS, FOCHT & FITZGERALD

By /s/ LAURENCE L. PILLSBURY

Attorneys for Appellees